STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

JAMES LEE MOULTER,

Defendant-Appellant.

UNPUBLISHED
November 23, 2010

No. 293784
Ottawa Circuit Court
LC No. 08-032640-FC

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of five counts of first-degree criminal sexual conduct (CSC I) (sexual penetration of relative between 13 and 16 years of age) MCL 750.520b(1)(b)(ii). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was accused of the repeated sexual abuse of his daughter. He claimed that she was lying about the abuse, and presented numerous witnesses who testified that he was honest and that she was untruthful, making her credibility a material issue in this case. On appeal, he argues that certain evidence was "other acts" evidence that was inadmissible under MRE 404(b) or MCL 768.27a.

> The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. A court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. The determination whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony. [*People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009) (citations omitted).]

The admissibility of evidence under MCL 768.27a is also reviewed for an abuse of discretion. See *People v Pattison*, 276 Mich App 613, 621; 741 NW2d 558 (2007).

Defendant first takes issue with the testimony of complainant's friends, L. Z. and R. F., regarding instances of defendant tickling and spanking them, and giving them wedgies. L. Z.

testified that he tickled her near her breasts. R. F. said that defendant touched her breast area during the tickling, and also explained that when he gave her a wedgie his hand would go inside her pants and touch her buttocks. The girls estimated that they were 10 or 11, and 11 or 12 years old, respectively, when this happened. This evidence was admitted under MCL 768.27a, which provides:

> (1) [I]n a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. . . .
>
> (2) As used in this section:
>
> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.
>
> (b) "Minor" means an individual less than 18 years of age.

Defendant was accused of CSC I with respect to his daughter, a minor, which is a listed offense under MCL 28.722(e). The trial court found that the statements of R. F. and L. Z. would support a charge of second-degree criminal sexual conduct, contrary to MCL 750.520c, which is also a listed offense under MCL 28.722(e). This statute criminalizes sexual contact with a minor under 13 years of age. Sexual contact is defined to include intentional touching of intimate parts if it "can reasonably [be] construed as being for the purpose of sexual arousal or gratification [] done for a sexual purpose . . . ." MCL 750.520a(q).

Defendant argues that the trial court erred because the tickling, spanking, and wedgie were benign and playful and not for a sexual purpose, i.e., sexual gratification or arousal. In making this argument, defendant does not acknowledge the testimony that, during the tickling, defendant touched their breast or breast area, or R. Z.'s testimony that when he gave her the wedgie he touched her buttocks. Although defendant paints the behavior as innocuous, the conduct could give rise to a reasonable finding that it was for the purpose of sexual arousal or gratification. Accordingly, defendant has not established that the trial court abused its discretion in concluding that the testimony was admissible under MCL 768.27a.

The probative value of this evidence must outweigh its prejudicial effect. See *Pattison*, 276 Mich App at 621. However, unfair prejudice results only if the evidence is likely to be given undue weight by the jury or the probative value is substantially outweighed by the danger of unfair prejudice. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Here, that defendant was attracted to young girls made it more probable that complainant was telling the truth when she claimed that defendant acted out sexually with her. In *People v Mann*, ___ Mich App ___; ___ NW2d ___ (2010), this Court indicated that whether minors were "telling the truth had significant probative value because it underlies whether [the defendant] should be convicted of the crimes for which he was charged." *Id*. at ___. Further, the *Mann* Court found that where, as here, the jury was instructed that the evidence could only be used to assess the believability of testimony pertaining to the charged offenses, the probative value would not be outweighed by the danger of unfair prejudice. *Id*. Accordingly, we find no error.

Defendant next takes issue with evidence regarding C.F., a 17-year-old girl who lived with defendant and complainant. Defendant argues that evidence regarding her interactions with him should not have been admitted under MCL 768.27a because, given that she was over 16 years of age, the evidence would not have supported a charge of accosting or soliciting a minor for immoral purposes contrary to MCL 750.145a, a listed offense. However, while the trial court initially ruled that her testimony would be admissible based on the statute, it subsequently issued an opinion and order on reconsideration acknowledging that this ruling was in error. The court went on to find that the evidence was admissible under MRE 404(b). Even though the evidence did not involve sexual intercourse and varied from the charged offense, the court concluded that it was sufficiently similar to show a common scheme or plan. The court noted that C.F. was living with defendant, as was his daughter, that C.F. and his daughter were of similar age, that defendant exercised parental authority over them, and that he promised them gifts. Defendant has not argued that this ruling was erroneous. He does argue that the evidence was more prejudicial than probative, but the trial court found no unfair prejudice, reiterating that the evidence would be highly probative of complainant's credibility and was not so similar or so inflammatory that the jury would give it preemptive weight. We find no abuse of discretion.

Next, defendant argues that evidence of cookies on his computer that referenced websites suggestive of child pornography should have been excluded based on MRE 404(b)(1), which provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), our Supreme Court elaborated:

> [First,] [t]he evidence must be relevant to an issue other than propensity under Rule 404(b), to protect[] against the introduction of extrinsic act evidence when that evidence is offered *solely* to prove character. Stated otherwise, the prosecutor must offer the other acts evidence under something other than a character to conduct theory.
>
> Second, . . . the evidence must be relevant under Rule 402, as enforced through Rule 104(b), to an issue or fact of consequence at trial.
>
> Third, the trial judge should employ the balancing process under Rule 403. Other acts evidence is not admissible simply because it does not violate Rule 404(b). Rather, a determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making

decision of this kind under Rule 403. [Citations and quotation marks omitted; emphasis in original.]

This evidence was not proffered to show that defendant had a bad character and acted in conformity therewith. Complainant testified that defendant showed her pornographic sites to convince her that their sexual relationship was normal and to illustrate desired sexual behavior. Her credibility was a central issue at trial. The existence of these sites on defendant's computer had a tendency to make it more probable that complainant was telling the truth. Accordingly, the evidence was relevant under MRE 401 and admissible under MRE 402 unless it was inadmissible under MRE 403. For the same reasons discussed above, MRE 403 did not require its exclusion.

Finally, defendant challenges the admission of a video recording that he made. One segment arguably showed that defendant had focused the video camera on his daughter's breasts and vaginal area. In another segment, defendant had filmed the buttocks of girls who participated in a color guard with complainant. Defendant commented "butt shots", and then said "Back to [his daughter]" and filmed her buttocks.

In *People v Sabin (After Remand)*, 463 Mich 43, 60-61; 614 NW2d 888 (2000), our Supreme Court noted that "[u]nlike the courts of other jurisdictions, we have never adopted the so-called 'lustful disposition' rule, which allows the use of other acts for propensity purposes in sex offense cases." Thus, the evidence would be precluded if the prosecutor were trying to show that defendant was interested in sexual activity with young girls as evidence that he had acted on those impulses. In other words, the evidence would be precluded if the prosecutor were trying to show that defendant found young girls sexually interesting and acted in conformity therewith. However, here the prosecutor was trying to show that defendant was sexually attracted to his daughter. He was not trying to show a lustful disposition generally, but an attraction to the specific victim. Given this distinction, we conclude that the lustful disposition rule is inapposite. Moreover, that defendant was sexually attracted to his daughter had a tendency to prove that he was sexually active with his daughter, and also tended to establish that her claims were credible. Accordingly, the evidence was not barred by MRE 404(b).

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Christopher M. Murray